Arbitrability of Disputes Pertaining to Abusive Debt Collection Practices in the US: Striking the Balance between Efficiency and Fairness

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Motto:

"[The FAA] reflects a federal policy favoring actual arbitration — that is, arbitration as a streamlined 'method of resolving disputes,' not as a foolproof way of killing off valid claims."[2]

-Justice Elena Kagan

ABSTRACT:

This article examines whether the U.S. Supreme Court's recent rulings favoring arbitration is compatible with public policies that protect consumers from abusive debt-collection practices. In addition to policy issues raised by the "arbitrability" of consumer protection clauses, this paper argues that the "arbitrability" of abusive debt collection practices raises specific concerns. Specifically, the arbitration of such clauses brings into conflict two federal acts—the Fair Debt Collection Practices Act (FDCPA) and the Federal Arbitration Act (FAA), which both promote important public policies. Which should prevail? By analyzing the "clash of policies" in a consumer-debtor protection context, the author contends that public interest should prevail over private interests. The article concludes with recommendations calling for a complete ban of arbitration in consumer disputes concerning abusive debt collection practices.

I. INTRODUCTION

The phenomenon of expanding the use of arbitration to consumer related issues is part of a wider process of externalization of former public-sector responsibilities. The privatization of central services in society—in this case replacing parts of the judicial system such as courts with private actors—is a common tendency in the U.S., Canada, and the European Union. Often times, states and judges encourage such privatization.[3] This phenomenon takes different forms

[2] American Express Co. v. Italian Colors Restaurant, 133 S.Ct. 2304, 2313 (2013) (Kagan, E., dissenting) (citing Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481 (1989)).

[3] TREVOR C.W. FARROW, CIVIL JUSTICE, PRIVATIZATION, AND DEMOCRACY 71, 156 (2014) (noting that "[n]otwithstanding the significant judicial support for ADR initiatives, it is important to recognize that this support is not without some reservation.").

on the two sides of the Atlantic, however, the same questions and concerns are troublesome in both regions.

To be able to distinguish between private and public interests that are supported by strong public policies is relevant to the matter at hand. Whether enforcement of consumer rights is deemed either a matter of general, public interest or one which regards private interests, may have different implications and results. The important question considers the purpose of arbitration in the consumer context. Is there a purpose or a need for arbitration in consumer related matters? What kind of interests does it serve: private or public? What purpose does enforcement of consumer protection laws serve? Are those purposes maintained or affected by arbitration or ADR mechanisms? These questions will provide the answer to the title of this article.

In the following subsections, the paper addresses the factors affecting enforcement of consumer protection, the implications of the different interests pursued by the public policies behind consumer protection and arbitration, and whether there is a need for arbitration or ADR in consumer-debtor disputes at all.

A. *Factors Affecting Enforcement of Consumer Protection Law*

Consumer protection provisions and statutes carry no meaning unless they can be effectively enforced. Therefore, it is not only the *absence* of an enforcement mechanism, but also the presence of an *inefficient* or *insufficient* one that can result in lack of redress: a mere duty to return only ill-gotten gains after the perpetrator has been caught.[4] Another avenue for redress is prosecuting the perpetrator under criminal law, which does not address consumer issues and places limits on persons seeking enforcement.[5] Ultimately, limits on available enforcement mechanisms are among the improper ways to ensure enforcement.[6]

The effectiveness of enforcement depends also on the behavior of and the powers granted to the interested subjects. For instance, a

[4] JOHN A. SPANOGLE ET AL., CONSUMER LAW: CASES AND MATERIALS, 949 (4th ed. 2013).

[5] *Id.*

[6] *Id.*

potential issue affecting enforcement is the *reluctance* or the *impossibility* of the consumers to assert their rights. Consumers must act in order for the enforcement mechanism, as proper as it may be, to become effective. If consumers do not complain about the abuse, then their legal rights are rendered totally useless. Hence, consumers must be informed and aware of their rights and act without hesitation to get them. *Lack of education* also falls into the category of issues that have an impact on enforcement for such a consumer, even if informed, might lack the capacity to properly understand their rights and act upon them.[7]

Enforcement may be difficult due to *economic reasons* as well.[8] In general, people are reluctant to utilize the courts even when the law provides for such a mechanism because trials are long, expensive, and risky. If one adds to this the fact that the consumer-related dispute might be smaller than the cost of litigation, the consumer will be deterred from taking action for the costs outweigh the benefits. Once again, the possibility to address the court as an enforcement mechanism is severely impaired. In such instances, the access to administrative types of redress *via* recourse to a public agency might be the only option left. However, public enforcement brings only little and indirect benefits to consumers.

Last, but not least, enforcement is affected by the very businesses that might be subjected to it, *via contractual terms* requiring consumers to submit any claim to arbitration. Such clauses impose further restraints on enforceability of consumer rights by expressly banning the use of class actions, eliminating the recovery of attorney fees by consumers, avoiding jury trials as well as possibilities for

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[7] Arthur Best & Alan R. Andreasen, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress*, 11 L. & SOC'Y REV. 701, 703 (1977) (discussing a survey that is still relevant today, the authors observe that "throughout the complaint process, people of low education, income, and social status are underrepresented."); *see* Amy Schmitz, *Access to Consumer Remedies in the Squeaky Wheel System*, 39 PEPP. L. REV. 279, 302 (2012) (affirming Best and Andreasen's 1977 study, the author notes that "[r]esponse data confirmed research and theory suggesting that education influences consumer complaints. There was a significant positive association between education level and likelihood to notice anything about arbitration in consumer purchase terms . . . . This comports with other research indicating that consumers with less education are less likely to perceive purchase problems or assert their complaints.").

[8] Schmitz, *supra* note 7, at 313 (explaining that "[i]ncome and education therefore play significant roles in determining consumers' likelihood to complain and pursue their rights with respect to their purchases.").

appeal, using potential biased arbitrators and non-transparent procedures, circumventing the use of public courts in resolving disputes, and even obtaining decisions not based on law or legal precedents.[9]

This paper focuses mainly on the last enforcement issue, although overlaps with the other three may also be mentioned. As it was stated, businesses now impose contractual terms by which consumers are waiving their statutory rights to a judicial process and opt for an extra-judicial one. The thin line between private interests (expressed in the parties' agreement) and the public interests (expressed in the statutory provisions) is discussed in greater detail in the following subsection.

B. *The Thin Line Between Public and Private Interests*

Opting for arbitration or other ADR mechanism is, beyond doubt, a private interest matter, for dispute resolution clauses that opt out of the public court system are mere contractual provisions.[10] This explains why private actors (such as arbitrators and mediators) exhibit a more market and business oriented approach by focusing on maintaining good-will and addressing the dispute as purely contractual. Since the dispute is perceived as private, they are less concerned with the punitive and/or deterrent effect of their decisions with respect to potential similar disputes that may arise. Each problem will be assessed as unique and not as one that might or might not generate binding case law.[11]

Conversely, public bodies (such as courts and agencies) are more concerned with procedural safeguards, the observance of statutory rights, and the future effects of their decisions. The problem is assessed

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[9] SPANOGLE, *supra* note 4, at 950. *See also* Schmitz, *supra* note 7, at 312 (using empirical evidence to support the conclusion that these clauses restrict consumer rights. Schmitz concludes "[t]he SWS hinders this consumer's empowerment by suppressing information sharing and consumer's pursuit of contract claims.").

[10] NIGEL BLACKABY, CONSTANTINE PARTASIDES, ALAN REDERN, & MARTIN HUNTER, REDFERN AND HUNTER ON INT'L ARBITRATION 2 (6th ed. 2015) (explaining that arbitration is an "informal and essentially *private and consensual* system of dispute resolution.").

[11] Richard M. Alderman, *The Future of Consumer Law in the United States—As the Civil Justice System Goes, so Goes Consumer Law* 13 (British Institute of International and Comparative Law, Working Paper, 2006).

as a potential part of a repetitive process, which needs to take into account previous decisions (if any) or future ones. Therefore, the deterrent and punitive effect bears a larger significance, in order to ensure that the violating party is aware of the consequences and will not repeat its behavior, while the rest of the public will be informed that its statutory rights are upheld and duly enforced.[12]

Increased use of private actors—arbitrators, mediators, adjudicators—as providers and guarantors of public services brings concerns related to reduction and elimination, as well as to control of access to civil justice[13] and the concomitant issue of responsibility and liability of these service providers, who may be driven by commercial incentives, rather than public interest. A number of surveys and reports in the U.S. on the use of arbitration in consumer matters, have already pointed out that arbitrators may be biased due to the 'repeat-player[14] advantage' mechanism, which means that by ruling in favor of the industries they increase their chances to be re-appointed in future cases.[15] Such form of pressure, although not necessarily singular or a general one, is sufficient to illustrate a genuine concern—that privatization of the dispute resolution process gives control over the outcome and the forum.[16]

The 'repeat player advantage' has also a facet that places the consumer at yet another great disadvantage. Unlike commercial arbitration where both parties have the same potential of being involved in future disputes and exercise equal influence over the selection process, in consumer arbitration it is only one party that is involved in multiple arbitrations—the business. This decreases the consumers' chances for they are less able to obtain information regarding other

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[12] *Id.* at 4.

[13] *Id.* at 2-3.

[14] Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267 (1995).

[15] KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS 23 (2015); Budnitz, *supra* note 14, at 293.

[16] Alderman, *supra* note 11, at 9.

arbitration decisions[17] and lack the economic power to put up a strong case. At the same time, one may address the potential responsibility of the public sector that agreed to have parts of its functions privatized.

The goal of privatization is to increase the quality and efficiency of services offered,[18] mainly by removing monopoly and providing options that will increase competition among providers and the participation of citizens.[19] With respect to dispute resolution however, especially one meant to circumvent resort to public courts, the removal of public courts and the guarantees offered for due process, is in fact part of the problem. If one may find justifications for it—such as the need of individuals or businesses for swift and confidential dispute resolution[20] and enforcement of rights—it is not less true that private 'for-profit' organizations providing ADR services may have an adverse effect on the benefits inherent in the public nature of the judicial system, such as transparency[21] and predictability[22] *via* uniform and consistent application of the law.[23] Moreover, predominantly in the U.S. resort to ADR removes the gap-fulfilling role of courts that are dealing with matters which slipped through the cracks of legislation or were ignored by it.[24]

The above is not to be construed in the sense that the two—public justice and private dispute resolution—have necessarily conflicting interests. It proves that they do have, however, a different focus, which generates particular types of results. For instance, the EU's approach is that consumer protection is a private matter (at its inception), which the consumer is free to address *via* ADR, provided ADR mechanisms remain "alternative" and ensure a swift and

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[17] *Id.* at 13. *See, e.g.*, Donna M. Bates, *A Consumer's Dream or Pandora's Box: Is Arbitration a Viable Option for Cross-Border Consumer Disputes?* 27 FORDHAM INT'L L.J. 823 (2003).

[18] FARROW, *supra* note 3, at 55.

[19] *See id.* at 189-90.

[20] *Id.* at 60.

[21] *Id.* at 62 (expressing that "one of the central goals of the privatization movement—from an informational perspective—is typically to move disputes out of the public eye and into confidential, or at least largely private, *in-camera* settings.").

[22] *See* CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY. REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT §1028(a) (2015), Appendix A, Preliminary Results 2013, p. 7.

[23] Alderman, *supra* note 11, at 6.

[24] *Id.* at 6.

convenient result to the consumer's needs. Where the result is not satisfactory, the consumer maintains the option to bring the issue into a public forum and thus make use of all statutory and procedural rights at their disposal. The United States' approach is still not fully decided. While the majority of the U.S. Supreme Court justices appear to see no danger associated with arbitration, [25] there are voices that claim arbitration is about modification of substantive rights by reducing number of disputes, avoiding courts and juries, thus becoming a mechanism of circumventing courts. [26] The question which arises is whether arbitration and ADR mechanisms are needed in consumer related dispute at all, and it is answered in the following subsection.

C. *Is There a Need for Arbitration and ADR Mechanisms in Consumer Related Disputes?*

A survey conducted in 1977 on Consumer Response to Unsatisfactory Purchases identified that in cases where consumers took action in order to enforce their rights, the most common one was "to voice a complaint to the seller/retailer/service outlet/manufacturer (30.7% of the cases),"[27] while the least common was to complain to or *via* a third party (business/professional associations, public agencies, lawyers or courts) (3.7% of all instances in which consumers who noticed problems voiced complaints). [28] Such small figures led the survey's authors to conclude that: "sellers have a *near perfect monopoly* on complaint handling. They can feel free **to impose their own standards for complaint resolution** confident that consumers will not make use of the third-party mechanisms to review their actions."[29]

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[25] Given the effective vindication rule set out in *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth Inc.*, 473 U.S. 614 (1985), the two positions are not *prima facie* irreconcilable in the sense that the pro-arbitration approach of the Supreme Court was not to be used for depriving any of the arbitrating parties of their statutory rights. However, the effective vindication rule appears to have been disregarded in the recent decisions of the Supreme Court, which constituted, for instance, the reason for the dissenting opinion of Justice Kagan in *American Express Co. v Italian Colors restaurant*, 133 S. Ct. 2304 (2013).

[26] Alderman, *supra* note 11, at 8.

[27] Best & Andreasen, *supra* note 7, at 712.

[28] *Id.* at 713.

[29] *Id.* at 714.

The results were later confirmed by another survey from 2012, which further added that: "[t]he SWS[30] is therefore similar to arbitration and other private settlement processes in that **it allows companies to privatize or internalize complaint resolution**. It also hinders development of the law and limits public access to information regarding faulty products and company improprieties."[31] In such cases, one may wonder, is there any need for arbitration and other ADR mechanisms in consumer related disputes? Does arbitration play any role, besides depriving consumers of their rights and incentives, which obviously satisfies the interests of corporations?

The same survey answers positively. The perception in the U.S. is that arbitration or ADR is not *per se* bad and detrimental to consumers. However, this statement is subjected to a few qualifications: "[t]hey can be beneficial when *fairly and properly monitored and administered*, especially in basic contract disputes or intercommunal contexts in which parties share power and understandings."[32] There are, generally, certain advantages associated with arbitration, which is perceived as less time consuming, less cumbersome, and less costly than litigation.[33] At the same time, arbitrators might have greater expertise than a judge.[34]

Nonetheless, the number of disadvantages to consumers associated with arbitration seems to outweigh any benefits: waiver of fact-finding by a jury of their peers or to have the trial presided over by a judge; surrender of the right to full discovery; no possibility for appeal; no requirement for the arbitrator to rule according to the law or prior precedents; lack of transparency; distant, possibly biased and private forums; impossibility to resort to class actions or class arbitration which would lead to punitive damages; loss of statutory

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[30] The acronym "SWS" refers to the notion of "squeaky wheels" individuals who are proactive in pursuing their needs and complaints—and thus are most likely to get the assistance, remedies, and other benefits they seek. The author of the survey refers to it as a system, hence, SWS. (Squeaky Wheel System).

[31] Schmitz, *supra* note 7, at 317.

[32] *Id.* at 317. See also SPANOGLE, *supra* note 5, at 988, for a business-oriented perspective of advantages of arbitration in consumer related disputes.

[33] *See* FARROW, *supra* note 3, at 194–95 (detailing advantages associated with arbitration and ADR mechanisms).

[34] *See generally* Budnitz, *supra* note 14.

procedural advantages incentivizing private action (attorney fees, costs, statutory damages).[35]

Similar arguments are raised in favor of arbitration and other ADR mechanisms in the EU as well, not without emphasizing the detrimental effects of arbitration in U.S. consumer disputes.[36] The EU's position appears to be that arbitration and ADR are useful and recommended in those instances where the costs, length, and formalities of litigation would affect consumer redress. Thus, alternative, more flexible, friendlier, and cheaper means of redress are preferred, provided they serve the purpose of enforcing consumers' rights, and do not have the opposite effect, like in the U.S. It is one of the major differences in the approaches taken by the two mentioned jurisdictions. One may wonder how it is possible that starting from the same basis and perception, the two have ended up with such opposing results. One answer may come from the way the U.S. Supreme Court has chosen to enforce the federal policy favoring arbitration to the detriment of state consumer laws, a judicial development absent from the EU. It constitutes the focus of the next section.

II. A CLASH OF POLICIES: THE CURRENT APPROACH OF THE U.S. SUPREME COURT TOWARDS ARBITRABILITY AND ADR MECHANISMS IN CONSUMER RELATED DISPUTES

In the U.S., the balance between state policies in the field of consumer protection and a federal policy promoting arbitration has been tilted in the favor of the latter. If pre-dispute arbitration clauses in B2B contracts have been long accepted and used as private and efficient mechanisms of resolving disputes, their insertion and application to

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[35] Spanogle *supra* note 5, at 987. *See also* Budnitz, *supra* note 14, at 283–87 (explaining the disadvantages of arbitration and provides a summary of available case law).

[36] HANS-W MICKLITZ, ET AL., CASES, MATERIALS AND TEXT ON CONSUMER LAW 512–13 (2010) (discussing that "ADR schemes . . . try to cure the perceived deficiencies of 'traditional' in-court litigation, which is often considered too expensive, too formalistic and slow. . . . Their flexibility also allows for the development of true alternatives to in-court litigation, with more room for specialization and more room for a different, more consensus-based approach allowing parties to resume a dialogue instead of being each other's opponents. It is possible to distinguish between truly voluntary schemes which increase consumer rights and minimize costs on the one hand and those schemes, such as some arbitration schemes (especially in the US—that rather limit consumer rights.").

labor and consumer (B2C) contracts remained problematic. In the U.S., domestic arbitration became strictly enforced by the Federal Arbitration Act (the FAA), Chapter 1.[37] However, the most important role in supporting this approach belongs to the U.S. Supreme Court, which, through a constant case law, has admonished states that found arbitration as not the appropriate venue in consumer contracts. By doing so, the Supreme Court has in fact limited the power of a state to regulate consumer arbitration provisions, beyond the application of general defenses in contract law.[38]

A 2015 Briefing Paper of the Economic Policy Institute actually nominates the Supreme Court as the main culprit in enabling corporations "to force customers . . . into arbitration to adjudicate practically all types of alleged violations of countless state and federal laws designed to protect citizens against consumer fraud, unsafe products, and other forms of corporate wrongdoing."[39] The paper provides a comprehensive history of the judicial developments starting in the 1980s when the U.S. Supreme Court began promoting a strong pro-arbitration policy on the basis of the FAA, constantly expanding the FAA's scope, all based on a legal presumption that in case of doubt on whether a particular dispute comes within an arbitration clause, courts should resolve all doubts in favor of arbitration.[40] Thus, the FAA applies to disputes over contracts that are brought in state courts as well, provided the dispute involves interstate commerce, and preempts any state law with which it conflicts,[41] and it also covers statutory disputes.[42]

The expansion of scope was doubled by a constant rebuff of any attempts by states to enact legislation that would insulate consumers from being subjected to arbitration agreements. Hence, laws that

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[37] Amy Schmitz, *American Exceptionalism in Consumer Arbitration*, 10 LOY. U. CHI. INT'L L. REV. 81, 82 (2012).

[38] *Id.* at 83.

[39] Stone, *supra* note 15, at 3.

[40] *See* Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983).

[41] *See* Southland Corp. v. Keating, 465 U.S. 1, 15–17 (1984) (concluding that an arbitration clause that is enforceable in federal court is also enforceable in state court).

[42] *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985) (holding that an agreement to arbitrate a statutory claim is valid and that there is a strong presumption favoring arbitration in international commerce).

imposed rules to ensure that consumers were aware of their consent to arbitration,[43] or made composite arbitration clauses class action waiver unconscionable in consumer cases were struck down as restrictive of arbitration and preempted by the FAA,[44] or where the contract was governed by state and not federal law.[45] Different defenses raised against arbitration agreements, such as costly procedures,[46] illegality,[47] unconscionability,[48] or unenforceability[49] were dismissed by the Supreme Court's case law on the basis of the doctrine of severability of arbitration clauses from the contract. In addition to that, while it expanded the scope of the FAA, the Supreme Court has narrowed the standard for the judicial review of arbitral awards, making it harder for consumers to appeal an arbitral decision in court by holding that parties are precluded from agreeing to have a court review a decision of an arbitral tribunal.[50]

All of the above seem to suggest that in the clash of policies, the pro-arbitration policy of the FAA has prevailed over consumer protection policies. However, things may not be as clear-cut as they appear. The U.S. Supreme Court maintains that arbitration is appropriate only where it does not involve a loss of statutory rights (the "effective-vindication rule"). This principle was expressed[51] in the famous *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, where the court held that a party may be required to arbitrate a claim arising under a law, only if said party "may vindicate its statutory cause of action in the arbitral forum,"[52] and further added that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute."[53]

It must be emphasized here that since state laws limiting or regulating the use of arbitration agreements were struck down by the

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[43] Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 687 (1996).
[44] *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).
[45] DIRECTV, Inc. v. Imburgia, 136 S.Ct. 463, 467 (2015).
[46] Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 82 (2000).
[47] Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 442 (2006).
[48] Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 65 (2010).
[49] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 397 (1967).
[50] Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 579 (2008).
[51] *See* FARROW, *supra* note 3.
[52] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 637 (1985).
[53] *Id.* at 628.

court as preempted by the FAA, the statutory rights used in arbitration proceedings are only those arising from federal law. However, as the Supreme Court mentioned, provided that these rights are not affected by the proceedings, arbitration cannot be avoided. Given that there is no case involving claims arising under the Fair Debt Collection Practices Act (FDCPA) and arbitration that has reached the Supreme Court, just how the clash between the policies behind these two federal statutes will be resolved remains open for discussion and for any result.

III. FROM GENERAL TO SPECIFIC: THE CASE OF ABUSIVE DEBT COLLECTION PRACTICES DISPUTES

If the matter of arbitrability and enforceability of consumer protection in general appears to be settled, at least in the light of U.S. Supreme Court case law, the case of arbitrability of abusive debt collection practices disputes remains less clear. The following sections elaborate on what makes this particular type of disputes special, differentiating them from other consumer related disputes, and emphasize the wide palette of incentives and remedies for private action implemented *via* the FDCPA that serve as tools for enforcement of what the act deems public interest.

D. *Why are Abusive Debt Collection Practices and Financial Services More "Special"?*

The uniqueness of consumer claims under the FDCPA has already been pointed out by Alderman.[54] However, for the purposes of this article, the problems identified and the suggested solutions, a short overview of his arguments is necessary.

Alderman's starting point is the definition given by the FDCPA to debt collectors, and he rightfully concludes that by law, any FDCPA claim will involve what he calls a "non-party."[55] Since debt collectors hired by the original creditor to recover the debt are third-parties to the

[54] Richard M. Alderman, *The Fair Debt Collection Practices Act Meets Arbitration: Non-Parties and Arbitration*, 24 LOY. CONSUMER L. REV. 586, 587–89 (2012).

[55] *Id.* at 587 (stating that according to the definition of debt collectors adopted by the FDCPA, original creditors are excluded from the coverage of the act; thus, its subjects will always be third-parties hired to collect the debt on behalf of the original creditor).

original agreement, they are not usually covered by the consumer's agreement containing the arbitration clause. Non-parties are also involved in other financial related services—such as self-help repossession—where secured creditors resort to third party re-possessors to enforce their UCC Article 9 rights under the security agreement.

One must not disregard the fact that arbitration is a contractual matter, in the sense that there must be an enforceable agreement to arbitrate that covers the dispute. This poses the following two important questions regarding a debt collector under the FDCPA: on the one hand, whether the dispute is covered by the scope of an arbitration agreement between the creditor and the debtor and, on the other hand, whether the clause is enforceable by or against the debt collector, who is not party to the original contract. According to Alderman, the answer to the first question is to be found in the wording of the agreement, which means that where the language expressly defines claims subject to arbitration to include claims against debt collectors, the matter will be subjected to arbitration and vice versa.[56] Based on a decision by the Supreme Court, an arbitration clause may be enforceable upon a non-party on the basis of agency and equitable estoppel doctrines.[57] However, with respect to debt collectors, after analyzing a significant number of cases, Alderman shows that only equitable estoppel (a state law doctrine) may be used by non-parties as a viable basis for enforcing an arbitration clause.[58] Since the wording of the arbitration clauses does not affect the policies backing arbitration and protection of debtors against abusive debt collection practices, the article will not investigate this matter any further.

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[56] *Id.* at 593–95. In practice, the issue is not that easy, for the language might leave room for different interpretations. For instance, in *McCracken v. Green Tree Servicing, LLC*, 279 S.W.3d 226 (Mo. Ct. App. 2009), the lower court denied a request for arbitration because the agreement did not specifically state that it applies also to "successors and assigns." The appellate court took a different view, holding that "the scope of the arbitration provision is broad enough" to include the relationship between plaintiff and defendant that resulted from the lender's assignment of its right to receive the loan payments.

[57] Arthur Anderson LLP v. Wayne Carlisle, 556 U.S. 624, 632 (2009).

[58] Alderman, *supra* note 54, at 596–99.

E. *The Policy Issues in Arbitration of Abusive Debt Collection Practices Disputes*

Another part of Alderman's argument is the size of the industry, which brings with it a vast opportunity for abuse that the FDCPA was designed, from its outset, to deter by providing consumers with adequate compensation and providing a level playing field within which ethical collectors are not competitively disadvantaged. [59] As such, Alderman states that the policy considerations of the FDCPA differ from those that regularly arise when determining the validity and enforceability of agreement between immediate parties or between non-parties involved in other situations.[60]

F. *The FDCPA: Incentives and Remedies for Private Action*

When the FDCPA was enacted in 1977, Congress made a very clear statement with respect to its three-pronged purpose: "eliminate abusive debt collection practices by debt collectors . . . insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and . . . promote **consistent State action** to protect consumers against debt collection abuses."[61] All three of the purposes have a strong public interest implication.

1. *THE PUBLIC INTERESTS OF THE FDCPA*

The FDCPA is concerned with *debt collection as a widespread process and phenomenon affecting the general public.* In other words, it is less concerned with a particular phone call or letter than with the practice itself. This is reflected by the factors which should be of concern to courts in the assessment of debt collectors' civil liability: "the frequency and persistence of noncompliance," "the nature of . . . noncompliance," "the extent to which the debt collector's

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[59] *Id.* at 588–89.

[60] *Id.* at 600.

[61] Fair Debt Collection Practices Act, 15 U.S.C. 1692a § 802(e) (2010) (addressing Congressional findings and declaration of purpose) (emphasis added).

noncompliance was intentional," "the resources of the debt collector," and "number of persons adversely affected."[62]

Prohibition of unfair competition is the second major public policy of the drafters of the FDCPA.[63] In general, the intent behind competition laws is to protect the process of competition and maximize consumer welfare. [64] Therefore, the purpose of this stated policy is not only the protection of consumers, but also of fair competitors. The reason is that absence of consistent and adequate action against unfair or abusive practices may put fair competitors at a disadvantage. The drafter's intent of consistent enforcement of the FDCPA to ensure fair competition is emphasized by the choice of the administrative enforcer—the Federal Trade Commission (FTC): "For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act [1914 (FTCA 1914)], a violation of this subchapter *shall be deemed an unfair or deceptive act or practice in violation of that Act.*"[65] Hence, any violation of the FDCPA is held to be also a violation of FTCA 1914, which prohibits unfair methods of competition and unfair or deceptive acts or practices in or affecting trade, interpreted in a wider manner by courts to include conduct that runs counter to established public policy.[66]

The *consistent state action* to which the federal act refers was promoted primarily through private litigation, an option deeply embedded in the U.S. perspective on enforcement.[67] The FDCPA was to be a *self-enforcing statute*, "with private individual and class actions

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[62] Fair Debt Collection Practices Act, 15 U.S.C. 1692a § 813(b)(2) (addressing civil liability factors considered by the court).

[63] In practice, the FTC's work is not confined to competition, for it is currently receiving support from both the Bureau of Consumer Protection and the Bureau of Economics. The FTC takes formal enforcement action under the law when it considers it necessary so as to protect consumers and plays an important role in research and legislative recommendations with respect to competition and consumer protection topics. MAHER M. DABBAH, INTERNATIONAL AND COMPARATIVE COMPETITION LAW 237 (Maher M. Dabbah & Barry Hawk eds., 2010).

[64] As of 2010, the Dodd Frank Act transferred the FTC's functions under the FDCPA to the Consumer Financial Protection Bureau. DOUGLAS J. WHALEY, PROBLEMS AND MATERIALS ON CONSUMER LAW 700 (7th ed. 2013).

[65] Fair Debt Collection Practices Act, 15 U.S.C. 1692m § 814(a) (addressing administrative enforcement; Federal Trade Commission).

[66] DABBAH, *supra* note 63, at 245.

[67] Bates, *supra* note 17, at 844.

providing collectors with a powerful incentive to comply with the statute."[68] Thus, private action rather than government enforcement was, in the Congress' perspective, the main means of promoting industry compliance with the law.[69] The public interest here is intertwined with private interests, for in fact, the aggrieved debtors are turned into "a private attorney general" thus creating a strong incentive for private enforcement.[70]

2. *FINANCIAL AND PROCEDURAL INCENTIVES FOR PRIVATE ACTION*

In 2009, the FTC[71] still believed that "it is important for the FDCPA to be primarily a self-enforcing statute as Congress intended."[72] The reason was that the number of abusive debt collection complaints received each year[73] did not make it feasible for the federal government law enforcement to be the exclusive and primary means of deterring violations.[74] In other words, there was not enough money and personnel to handle all FDCPA infringements at an administrative level. As such, the FTC concluded: "[p]rivate actions . . . are critical in deterring those who would violate the FDCPA."[75]

In this context, private action is to be understood as private civil litigation. Private civil litigation would result in public decisions intended to create a binding precedent and bring consistency in

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[68] FEDERAL TRADE COMMISSION, COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE 66 (2009).

[69] *Id.*

[70] Steven G. Potach, *New Protection Against the Unethical Bill Collector: Debtors' Remedies Under the Fair Debt Collection Practices Act,* 11 CREIGHTON L. REV. 895, 923 (1978).

[71] Fair Debt Collection Practices Act, 15 U.S.C. 1692m § 814 (addressing administrative enforcement; Federal Trade Commission).

[72] *See* FEDERAL TRADE COMMISSION, *supra* note 68.

[73] In 2009 the number of complaints received by the FTC per year was more than 70,000. In 2016, the figure is above 85,000, which makes debt collection the largest source of consumer complaints in the US. *See* CONSUMER FINANCIAL PROTECTION BUREAU, FAIR DEBT COLLECTION PRACTICES ACT CFPB ANNUAL REPORT 3 (2016).

[74] FEDERAL TRADE COMMISSION, *supra* note 68, at 67.

[75] *Id.*

interpretation. [76] To that end, Congress provided the aggrieved consumer-debtors with several financial and procedural incentives to encourage private action. **First**, it stated that in addition to the actual damage incurred by the consumer, the court was free to award "statutory" damages for "any violation" in an amount not exceeding $1000.[77] **Second**, it specifically allowed for class actions.[78] **Third,** it capped statutory damages for a class action at the lesser of $500,000 or one percent of the debt collector's net worth.[79] **Fourth,** it provided that in case of a successful enforcement action, both the costs of the action and reasonable attorney's fees (as determined by the court) were to be paid to the consumer by the debt collector.[80] **Last,** it authorized (with minor exceptions) a choice of venue for the consumer, enabling them to bring action in any "appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction . . . ."[81]

3. *THE ADVANTAGES OF PRIVATE ACTION*

Another strong argument in favor of private action through public litigation is that the public courts' powers are not limited only to protection of individual consumers. They can also set guidance for debt collectors, indicating not only what they cannot do, but also what they

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[76] Alderman, *supra* note 54, at 602 (stating that with respect to consistency of interpretation, one must not neglect the possibility of the court to address new technologies and innovative collection practices, which did not exist at the time when the FDCPA was adopted; given that a Congressional amendment can be long and cumbersome, change can come from courts).

[77] Fair Debt Collection Practices Act, 15 U.S.C. 1692I §813 (a)(1)-(a)(2) (addressing civil liability; amount of damages).

[78] *Id.* The public policy rationales behind arbitration and those behind class actions are at odds, especially when it comes to consumer protection. It is worth noting here that unlike the U.S., where the Supreme Court has upheld class action waivers in *AT&T Mobility LLC v. Conception*, 563 U.S. 333 (2011), *Italian Colors v. American Express*, 570 U.S. 228 (2013), and *DIRECTV, Inc. v. Imburgia*, 136 S.Ct 463 (2016), in neighboring Canada the courts interpret consumer legislation as evidencing legislative intent to allow class actions even where an arbitration clause is present. *See* Wellman & Corless v. TELUS & Bell, 2014 ONSC 3318 (CanLII), where the Ontario Superior Court of Justice certified a class proceeding despite an arbitration clause being present in the consumer contract.

[79] Fair Debt Collection Practices Act, 15 U.S.C. §1692k(a)(2)(B) (2006).

[80] *Id.* at 15 U.S.C §1692k(a)(3).

[81] *Id.* at 15 U.S.C. §1692k(d).

should do in order to comply with the FDCPA, something which arbitration or any other ADR mechanism cannot deliver.[82] As such, in the case of arbitration, other debt collectors would not know how to avoid future liability. On the premise that the FDCPA is based on consistent rules and guidance for both consumers and businesses involved in debt collection, arbitration frustrates Congress' intent.[83]

There are also significant differences with regard to the length to which a public court would go, in comparison with arbitration, to not frustrate the purpose of the FDCPA. In the famous *West v. Costen*,[84] in order to enforce the sanctions under the FDCPA, the court went as far as piercing the corporate veil,[85] holding that:

> [I]t would be unfair to the plaintiffs and contrary to the purpose of the FDCPA to uphold MSF's corporate facade. Although some issues still remain for trial, upon undisputed facts MSF is liable to the plaintiffs for some blatantly illegal collection practices. Yet MSF is no longer doing business . . . and it thus seems likely that its assets, if any remain, will be totally inadequate to meet plaintiffs' damages . . . Furthermore, the FDCPA's purpose to "eliminate abusive debt collection practices by debt collectors," 15 U.S.C. §1692a, would be frustrated if MSF's corporate façade was an effective shield against persons seeking their private remedies under the Act.[86]

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[82] Alderman, *supra* note 11, at 602. Alderman uses as an example the decision in *Barlett v. Heibl*, 128 F.3d 497, 501 (7th Cir. 1997), where the judge proposed a "safe harbor" letter for the debt collectors to use in order to avoid the type of dispute posed by the case. By doing so, the decision ensured not only remedies and relief for the aggrieved consumer, but also that other debt collectors will be able to avoid liability while still in full compliance with the law. This type of decision protects both the interests of other consumer-debtors and debt collectors.

[83] *Id.* at 603.

[84] West v. Costen, 558 F. Supp. 564, 564–88 (W.D. Va. 1983).

[85] *See* Alexandra Horvathova & Catalin Gabriel Stanescu, *Piercing the Corporate Veil: US Lessons for Romania and Slovakia*, 17 CHI.-KENT J. INT'L & COMP. L. 1, 3–4 (2016) (discussing the case and the application of the veil piercing doctrine).

[86] *Costen*, 558 F. Supp. at 587.

The court's position is clear and self-explanatory; any obstacle that would frustrate liability of the debt collector and the enforcement of the FDCPA must be surpassed, otherwise the law would be reduced to mere letters with no effect.

In the light of all the above, the question would then be, why allow or go to arbitration at all if the end result is the frustration of the law. The Supreme Court has not yet ruled on the matter involving the conflict between the FDCPA's purposes and those of the FAA; therefore, one cannot finger-point in its direction, like in the case of general consumer protection issues. However, that is not to say the case law of the Supreme Court bears no implications in this area. So far, the Supreme Court has pushed in the direction of privatization of the judicial system by upholding and expanding the scope of arbitration beyond its original intent. It is the shift from public to private interests that explains the wide pro-arbitration trend and it is the same shift that, purposely or not, ended up stripping the consumer of all the statutory incentives provided by the FDCPA and circumventing the courts.

IV. CURRENT LEGAL FRAMEWORK AND PROPOSALS

Since the issue of consumer protection and its general conflict with arbitration has been present for the past thirty years, there is a significant amount of literature addressing it. There have been proposals from consumer organizations, state agencies, or scholars on how to address and solve the conflict. Two main categories of proposals have emerged: one suggests an amendment to the FAA to exclude or limit its application to consumer protection matter; the second advocates the implementation of the Arbitration Fairness Act (AFA) to deal with mandatory pre-dispute arbitration clauses. In other words, the advocates of reform want to put back the "alternative" in the alternative dispute resolution.

A. *Amendment of the FAA*

In one of the few articles dedicated to arbitrability of unfair debt collection practices, Alderman maintained that the proper solution for preventing arbitration from degenerating consumers' rights under the FDCPA is changing the federal law, namely by amending the FAA.

This is a solution that is supported by other scholars as well, with respect to consumer protection arbitration in general.[87] His proposal was to insert a provision precluding pre-dispute arbitration clauses in consumer contracts from extending to non-party disputes and to permit parties to agree on arbitration only after a dispute arose.[88]

B. *Fairness in Arbitration Act*

A more powerful and direct solution supported by Alderman and consumer advocates[89] is the implementation of AFA of 2011, which would prohibit pre-dispute arbitration clauses in all consumer contracts.[90] This act states among the findings section, which led to its drafting, that "[m]andatory arbitration undermines the development of *public law* because there is inadequate transparency and inadequate judicial review of arbitrators' decisions."[91] So far, the act did not receive congressional support. However, one must notice that from the perspective of public versus private interests, such a solution banning *only* mandatory pre-dispute arbitration would not solve much. Cconsumer-debtors would still be in the position to have their statutory rights removed by an arbitration clause, which would end up frustrating the purpose of the FDCPA. For this reason, the article's conclusion proposes a third option.

VI. CONCLUSION—REFORMING THE FDCPA

This article contends that in a conflict between the public policies of the federal act banning abusive debt collection practices (FDCPA) and the pro-arbitration public policy (FAA), the former must take precedence over the latter. Hence, not only pre-dispute mandatory arbitration should be banned from the area of abusive debt collection practices, but arbitration altogether.

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[87] Bates, *supra* note 17, at 897.

[88] Alderman, *supra* note 54, at 611–12.; Alderman, *supra* note 11, at 17.

[89] Stone, *supra* note 14, at 25. The authors of the report claim that the AFA is "the best hope for stopping these trends and restoring justice to ordinary citizens. It is crucial that this act gets the support of everyone who believes that consumer and employee rights are important and worth protecting."

[90] Alderman, *supra* note 54, at 612; Schmitz, *supra* note 37, at 83.

[91] S. 1133, 114th Cong. Arbitration Fairness Act §2 (emphasis added).

There are three main arguments to support this position. **First,** there is *a chronological argument*. The FAA was adopted in 1925, while the FDCPA was adopted in 1977. As the newer rule, the policies behind the FDCPA should count as exempted from the general policy behind the FAA. **Second,** while the FAA constitutes a general, broader rule regarding pro-arbitration policies in consumer matters, the FDCPA may be deemed *lex specialis*, a narrower rule in consumer matters due to the nature of claims and the involvement of non-parties. As such, the FDCPA should be perceived as an exception meant to ensure the enforcement of the three public policies mentioned in Subsection 3.3.1. **Third,** the FDCPA was enacted as a *minimum standard* of protection from which states cannot derogate. Thus, it is a matter of public interest and its subjects cannot waive the statutory minimum protection, otherwise any law could be eventually contracted out.

Given that conflicts between other federal consumer laws (i.e. Magnuson-Moss Warranty Act) and the FAA have resulted in inconsistent judicial results,[92] and that allegations of inherent conflicts between arbitration and the underlying purposes of other statues have been rejected by the Supreme Court, the proper solution in this article's view is to amend the FDCPA and expressly state that matters covered by the act may not be subject to arbitration. Since the FAA expresses a statutory policy, the legislator has the possibility to preclude arbitration or other ADR mechanisms and allow a statutory right to either a judicial remedy or a trial by jury. Thus, the legislator would make clear its intention to keep certain types of disputes in the exclusive domain of the courts for purposes of public policy and public interest.[93]

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[92] Bates, *supra* note 17, at 848 n.102 (2004).

[93] Julia Hörnle, *Legal Controls on the Use of Arbitration Clause in B2C E-Commerce Contracts*, 1 MASARYK UNIV. J.L. & TECH. 23, 27 (2008); *see* Peter J. Boyer & Mariah N. Samost, *The Arbitration of Consumer Unfair Trade Practices Claims,* (Oct. 17, 2011), http://apps.americanbar.org/litigation/committees/businesstorts/articles/fall2011-arbitration-consumer-unfair-trade-practices-claim.html.